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No. 86-1251

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

ASSOCIATED FILM DISTRIBUTION CORPORATION, AVCO EMBASSY PICTURES CORP., BUENA VISTA DISTRIBUTION CO., INC., COLUMBIA PICTURES INDUSTRIES, INC., FILMWAYS PICTURES, INC., METRO-GOLDWYN-MAYER, INC., TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL PICTURES DIVISION OF UNIVERSAL CITY, STUDIOS, INC., UNIVERSAL FILM EXCHANGES, WARNER BROS., INC., and WARNER BROS. DISTRIBUTING CORPORATION

Petitioners

v.

THE HONORABLE DICK THORNBURGH and THE HONORABLE HARVEY BARTLE, III, BUDCO THEATRES, INC., BUDCO QUALITY THEATRES, INC. and FOX THEATRES MANAGEMENT CORP.

Respondents

BRIEF OF BUDCO THEATRES, INC. AND ON BEHALF OF THE HONORABLE DICK THORNBURGH AND THE HONORABLE HARVEY BARTLE, III IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court properly held that the Pennsylvania Feature Motion Picture Fair Business Practices Law was not preempted under the Supremacy Clause of the United States Constitution and does not infringe upon exclusive rights granted by the Federal Copyright Act to distribute copyrighted works.

2. Whether the court properly held that the Pennsylvania Act was not invalid under the First Amendment as construed in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

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BRIEF OF BUDCO THEATRES, INC. AND ON BEHALF OF THE HONORABLE DICK THORNBURGH AND THE HONORABLE HARVEY BARTLE, III* IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

*In 1980 at the time the Complaint was filed in this action there was no corporation in existence known as Budco Theatres, Inc. Budco Quality Theatres, Inc. was properly named. In 1984, a new corporation was formed known as Budco Theatres, Inc., which ultimately acquired all of the outstanding stock of Budco Quality Theatres, Inc. In 1985, Budco Quality Theatres, Inc. was merged into Budco Theatres, Inc. Budco Theatres, Inc. is a wholly owned subsidiary of AMC Philadelphia, Inc., the majority of the stock of which is owned by American Multi-Cinema, Inc. American Multi-Cinema, Inc. is a subsidiary of AMC Entertainment Inc., a publicly owned company.

The Honorable Dick Thornburgh has now been succeeded in office by the Honorable Robert Casey and the Honorable Harvey Bartle, III has been succeeded by the Honorable LeRoy S. Zimmerman. Budco Theatres, Inc. has been authorized by these parties to file this brief on their behalf and to represent that they join in the positions expressed herein.

COUNTERSTATEMENT OF THE CASE

As stated in Section 2 of the Pennsylvania Feature Motion Picture Fair Business Practices Law ("Pennsylvania Act"), Act No. 14 of 1980, 73 P.S. 203-1 *et seq.*, the General Assembly of Pennsylvania enacted the Pennsylvania Act in 1980 in order to establish "fair business practice procedures for the licensing and distribution of feature motion pictures within the Commonwealth of Pennsylvania" for the purpose of "promoting the public interest and public welfare of this Commonwealth" by assuring "access of the public to work of artistic expression and opinion". The Pennsylvania legislature enumerated within the Act ten objectives which the Act sought to achieve, including, *inter alia*, preventing unfair and deceptive acts or practices in the business of distribution and exhibition of feature motion pictures (73 P.S. §203-2(7)); promoting fair and effective competition between exhibitors and distributors and in the business generally (73 P.S. §203-2(3),(8)); promoting wide geographic dissemination of feature motion pictures to the public at reasonable prices (73 P.S. §203-2(1),(4),(9)); preventing small independent exhibitors from unnecessarily going out of business (73 P.S. §203-2(6)); and permitting exhibitors to exercise their own business judgment after viewing the motion picture to select those motion pictures for exhibition which are most appropriate for their patrons (73 P.S. §203-2(10)).

The Act seeks to regulate the licensing of motion pictures in the Commonwealth of Pennsylvania by: (1) prohibiting the practice known as blind bidding, a practice whereby exhibitors must license a motion picture before having the opportunity to view it, and requiring trade screening prior to the licensing of the motion picture; (2) prohibiting payment of guaranteed minimum film rental and advance payment of film rental, known as "guarantees" and "advances"; (3) prohibiting exclusive

first runs for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area; and (4) establishing fair and open bidding procedures.

The United States Court of Appeals for the Third Circuit has affirmed the decision of the United States District Court for the Eastern District of Pennsylvania, upholding the constitutionality of the Pennsylvania Act in all respects. 800 F.2d 369 (3d Cir. 1986)(A 17), *affirming* 614 F.Supp. 1100 (E.D. Pa. 1985)(A 89). The District Court presided over a six week bench trial on remand after the Court of Appeals for the Third Circuit reversed a prior grant of summary judgment in favor of plaintiffs-petitioners, the major distributors and producers of feature motion pictures (referred to collectively herein as the "distributors"). *Associated Film Distribution Corp. v. Thornburgh*, 520 F.Supp. 971 (E.D. Pa. 1981), *rev'd and remanded*, 683 F.2d 808 (3d Cir. 1982).

The District Court found from the evidence presented at trial that prior to the 1970's and the enactment of the Pennsylvania Act, blind bidding had been strictly curtailed by a consent decree entered into among most of the major distributors and the United States Department of Justice in proceedings subsequent to *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). The consent decree specifically limited the number of pictures a distributor could blind bid to three per year. After the expiration of this restriction, "most" motion pictures and "virtually all" motion pictures with large box office grossing potential, known as "blockbusters", were blind bid. 614 F.Supp. at 1103-04 (A 93).

When blind bidding a motion picture, the distributor determined how much information, if any, about the upcoming motion picture to give the exhibitors prior to licensing. The District Court specifically found that, based on the information provided by the distributors to exhibitors, usually contained in a letter sent by the distributor soliciting the exhibitor's bid for a license, "the

exhibitor had no rational way to differentiate a blockbuster from a disaster", "distributors were licensing films by tactics ranging from exaggeration to outright misrepresentation," and the "solicitation sometimes passed beyond hype into deception." 614 F.Supp. at 1107 (A 100).

Other practices and abuses during the period prior to enactment of the Pennsylvania Act also contributed to difficulties experienced by certain exhibitors in licensing sufficient quality feature motion pictures for their viewing audiences. The District Court recognized and did not dispute the credibility of the exhibitors' testimony that exhibitors had suffered substantial losses as a result of depositing nonrefundable guarantees based upon inaccurate information obtained from the distributors about their motion pictures. 614 F.Supp at 1109 n.13 (A 107). In fact, the distributors acknowledged at trial that in certain instances because of the amount of the guarantee, exhibitors paid well over 100% of the box office in effective percentage film rental. Abuses occurred in the bidding process itself where favored exhibitors were given secret looks at competitor's bids in order that the favored exhibitor could meet or beat those bids and "win" the award, without regard to whether the bid originally submitted by the favored exhibitor was the high bid. 614 F.Supp. at 1112 (A 111).

It was in the context of these licensing practices that the Pennsylvania legislature passed the Pennsylvania Act in an attempt to curb the abuses then in existence.

Prior to the effective date of the Pennsylvania Act, the distributors brought this action challenging the constitutionality of the Act and reciting a host of dire consequences that would arise from the Pennsylvania Act if it were permitted to take effect, including delays in the release of motion pictures, delays in licensing that would foreclose the distributors from obtaining prime theatres in which to exhibit their pictures, dramatic increases in costs to the distributors and declines in percentage film

rental. The District Court consistently found these claims to be "unfounded", "without support" and "overstated".

After the abolition of blind bidding, the District Court found that exhibitors could make a rational attempt to evaluate the box office potential of a motion picture, to vary their bids according to the exhibitor's perceived worth of the film, to determine the appropriateness of a motion picture for a particular community and to judge whether the picture should be exhibited in a large or small theater. 614 F.Supp. at 1107 (A 101-102). The District Court further found as a fact that trade screening "has simply not caused delay in the release of motion pictures." 614 F.Supp. at 1108 (A 103).

Regarding guarantees and advances, the District Court found that the distributors' remaining claims about how the lack of guarantees and advances significantly affected their bottom line were belied by the testimony of their own witnesses. 614 F.Supp. at 1110 (A 108). As the District Court concluded later in its opinion, "It is not proven that the legislation in the present case has had *any* impact on profits." 614 F.Supp. at 1119 n.29 (emphasis in original) (A 126). Finally, the District Court found "no credible evidence that the prohibition of advances materially affects the credit relationship or the collection of debts." 614 F.Supp. at 1110-11 (A 108).

The District Court found that the 42-day clause, 73 P.S. §203-7, as well as providing the opportunity for wider dissemination of motion pictures was also more likely than not to increase film rental terms to the distributors where pictures were reoffered on the forty-second day. 614 F.Supp. at 1111-12 (A 110).

The District Court concluded that none of the burdens which the distributors claimed arose from the Pennsylvania Act had been shown to exist or to have arisen from the Act. The Court of Appeals for the Third

Circuit ruled, *inter alia*, that the only burdens the distributors claimed, whether proven or not, related to maximizing income, and that trade regulation like the Pennsylvania Act, which indirectly affects monetary return, could not be invalidated with regard to the Copyright Act because of such burdens. In addition, the Court of Appeals held that such incidental effects, particularly given their miniscule proportions in this case, did not inhibit First Amendment activities in any sense like the taxation statute at issue in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and applied the test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), and approved by this Court in *Minneapolis Star*, as the appropriate test in such instances. The distributors did not even attempt to argue that the Act was invalid under the *O'Brien* test, and the Court of Appeals sustained the constitutionality of the Pennsylvania Act.

REASONS FOR DENYING THE WRIT

A. The Pennsylvania Act Does Not Conflict on its Face or in its Operation with Any Rights Granted by the Copyright Act and is Not Preempted by the Supremacy Clause of the United States Constitution

The distributors mistakenly try to create an argument that the Pennsylvania Act conflicts with rights and protections offered by the Copyright Act, 17 U.S.C. §101 *et seq.*, by expanding the precise language of the Copyright Act beyond its limits. The only right in issue is the exclusive right of the copyright owner "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending." 17 U.S.C. §106(3). The distributors mistakenly assume that the exclusive right to "distribute" is an "exclusive right to control the time, mode and terms under which copyrighted works may be used." (Petition at 7). The distributors do not and cannot cite any authority

for this expansive interpretation. In fact, this Court and the United States Courts of Appeals have unanimously held to the contrary of the expansive interpretation urged by the distributors. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Allied Artists Pictures Corp. v. Rhodes,* 679 F.2d 656 (6th Cir. 1982); *Morseburg v. Balyon* 621 F.2d 972 (9th Cir. 1980).

This Court has examined the goals and objectives of Congress in enacting the Copyright Act and has held that the grant of monopoly conferred by the Copyright Act is for the primary purpose of bestowing an incentive to the author to exercise his skill to the benefit of the public, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127(1932). It is the monopoly that is the incentive, *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539 (1985); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and the financial reward to the owner is only a secondary consideration, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). The distributors' arguments regarding prescriptive and affirmative rights confuse and misstate this fundamental principle.

In the *Paramount Pictures* case, this Court discussed the Copyright Act in the context of a court injunction against the practice of block booking, defined by this Court as the practice of licensing or offering for license one picture or group of pictures on condition that the exhibitor will also license another picture or group of pictures released by the distributor during a given period. In upholding the prohibition against block booking, this Court stated that "where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights." This Court held that adding to

the monopoly of the copyright in this way did not serve the public interest and that restricting the practice of block booking was proper.

Blind bidding, the practice of licensing a motion picture before the exhibitor has an opportunity to view it, which practice is eliminated by the Pennsylvania Act's requirement of a trade screening, perpetuates the same evil as block booking. When a picture is blind bid, exhibitors must rely on the publicity and hype disseminated by the distributors to judge the picture (A 100), and inferior pictures draw on the marketing ploys of the distributor rather than the quality of the picture itself. As found by the District Court in the instant case, "Trade screening allows exhibitors to judge films on what they perceive as real worth, rather than purely on the basis of reputation." (A 103). Blind bidding prevents a motion picture from standing on its own merits just as block booking did. Despite the fact that the prohibition of block booking impacted on and lowered the reward to the holder of a copyright on a less successful motion picture, the licensing of which could no longer be a condition to licensing a more successful picture, this Court found no conflict with the Copyright Act because the exclusive rights — the monopoly — of the copyright owner were still protected.

The Courts of Appeals in various circuits, including the Third Circuit in both its decisions in this case, have all properly considered and applied the principles of copyright law as set down by this Court through the years. The Sixth Circuit in *Allied Artists Pictures Corp. v. Rhodes*, *supra*, 679 F.2d at 662-663, concluded that:

> "We do not find authority for the argument that state trade regulation which affects distribution procedures and, indirectly, monetary returns from copyrighted property is invalidated implicitly or explicitly by the terms of the Copyright Act . . . or the copyright clause [of the United States Constitution]."

In *Allied Artists*, the Sixth Circuit examined an Ohio statute that is very similar to the Pennsylvania Act and which also requires trade screening and regulates the licensing process for motion pictures. The Sixth Circuit, like the Third Circuit, upheld the constitutionality of the Ohio anti-blind bidding law against challenges on First Amendment and copyright grounds.

In its first opinion in the instant case, 683 F.2d 808 (3rd Cir. 1982)(A 70), the Third Circuit likewise noted that the exclusive rights granted by Congress pursuant to the Copyright Act do not preclude all state regulation that impacts on financial reward to the copyright holder:

> " 'The Supreme Court has rejected the notion that because a 'copyright is property derived from a grant by the United States,' it is not subject to state regulation of the manner in which its product is marketed. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128, 52 S.Ct. 546, 547 76 L.Ed. 1010 (1932). Further, the Supreme Court has rejected claims that the exclusive right granted by Congress to distribute copyrighted material included the exclusive right to distribute it in the manner deemed most desirable by the copyright holder. *Watson v. Buck*, 313 U.S. 887, 61 S.Ct. 962, 85 L.Ed. 1416 (1941).' " 683 F.2d 815, *quoting*, *Allied Artists Picture Corp. v. Rhodes*, 496 F.Supp 408, 446 (S.D. Ohio 1980), *aff'd in relevant part, remanded on limited issues*, 697 F.2d 656 (6th Cir. 1982).

Moreover, the Court of Appeals for the Ninth Circuit examined and sustained a California law which requires that the seller of a work of fine art pay a royalty in the amount of 5% of the gross sales price to the artist. *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980). The Ninth Circuit held that it was manifest that the right to vend provided in the Copyright Act did *not* mean "a right to transfer the work at all times and at all places free and clear of all claims of

others. . . [i]t merely means that the artist has 'the exclusive right to transfer the title for a consideration.' " 621 F.2d at 977. The right to vend as provided in the 1909 Copyright Act is no different than the right to distribute in the current 1976 Copyright Act.

Far from being any conflict among the Courts of Appeals such as might elevate the importance of this case for review by this Court, the Sixth Circuit, which examined a similar Ohio statute, also flatly rejected a challenge based on the Copyright Act. *Allied Artists Picture Corp. v. Rhodes, supra*, and the decisions among the courts examining this issue are consistent.

Moreover, despite ample opportunity in the courtroom, the distributors failed to make any showing of a "pervasive state scheme" that "restricts affirmative rights granted by Congress" such as they now seek to create out of the whole cloth and magnify to a level of importance that would merit this Court's review.[2] To the contrary, and as specifically acknowledged by the Third Circuit Court of Appeals, the District Court after a six week trial made detailed factual findings that:

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2. The distributors claim that the trade screening requirement in Section 4 of the Pennsylvania Act, 73 P.S. §203-4, prevents them from exercising their right to license and distribute a motion picture until long after they purport that the copyright attaches. However, what the distributors really seek is a right to license and distribute a motion picture long before any copyright attaches, a practice that is unfair and which has been used to mislead the exhibitor. The testimony at trial in this case about the release of the motion picture "Beverly Hills Cop" illustrates this. The picture was licensed in early 1984 in states that did not have an anti-blind bidding law like the Pennsylvania Act for a Christmas 1984 release and was described in the bid solicitation letter as an action/adventure story starring Sylvester Stallone. When it was finally released, it was a much different picture — a comedy/action story starring Eddie Murphy. The distributors could not have a copyright in the motion picture starring Sylvester Stallone that they sought to license in states without anti-blind bidding laws like Pennsylvania — that picture was never made.

> "the various provisions of the Act have 'had no effect on the incentive to make and distribute motion pictures;' do 'not dilute the distributors' ownership rights in their films;' set 'no limit on the financial terms at which films may be licensed;' do 'not restrict the distributors' right to license its films;' and have 'not impaired distributors' ability to release their films on the dates they desire.' 614 F.Supp. at 1122-23. Thus, the district court found that '[p]laintiffs have not fulfilled their burden of demonstrating that the Pennsylvania Feature Motion Picture Fair Business Practices Law has interfered with the Federal Copyright Act.' *Id.* at 1122." 800 F.2d at 376 (A 14).

The distributors have never contended that these findings by the District Court were clearly erroneous. *Id.* The Third Circuit Court of Appeals recognized that these factual findings by the District Court made it difficult, at best, to argue that the operation of the Pennsylvania Act interfered with the goals of the Copyright Act. The Court of Appeals stretched, solely for purposes of argument, and reexamined the District Court's conclusion that the burdens were insignificant. The most the Court of Appeals could find, even accepting the distributors' arguments, was some *slight* effect on the copyright owner's right to dispose of the motion picture on the optimum terms such that income is maximized. In the *Paramount Pictures* case and the *Fox Film* case, this Court clearly rejected such burdens as being significant in determining whether the restriction in issue was preempted by the Copyright Act.

Moreover, to try to gloss over the lack of any significant impact on the rights they now try to claim have been restricted, the distributors have attempted to argue that there was a fundamental flaw in the analysis by the Third Circuit because it failed to subject the Pennsylvania Act to special scrutiny. The distributors claim that

the Act should receive such scrutiny because it deals directly and specifically with copyrighted works and is to be distinguished from statutes of general application, which do not merit special scrutiny. The distributors argue that the Pennsylvania Act is a specific restraint on motion picture licensing practices "applied solely to the motion picture industry in ways that interfere directly with the federal right of distribution." (Petition at 12).

The injunction against block booking at issue in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), also applied directly to motion picture licensing practices. Nevertheless, this Court approved the restriction, and in direct contradiction to the distributors' complaint that the Third Circuit acted improperly in subordinating the burdens claimed by the distributors to an assessment of the Pennsylvania Act's effect on Congressional goals (Petition at 11), this Court used an analysis of whether the public purpose behind the grant of monopoly that is the reward of a copyright was furthered as the foundation for its ruling that the restriction did not violate any rights conferred by the Copyright Act.

The Third Circuit Court of Appeals in its examination of the Pennsylvania statute has carefully conformed its analysis to the method and principles laid down by this Court. The District Court made factual findings that the Pennsylvania Act does not restrict any rights granted to the distributors by the Copyright Act. The Supremacy Clause of the United States has been enforced and adhered to, without the need for review by this Court.

B. This Court's Decision in Minneapolis Star Has Been Properly Applied in Determining that the Pennsylvania Act Does Not Violate the First Amendment

To create their argument that the Pennsylvania Act is unconstitutional on First Amendment grounds, the distributors presume — because they have failed to prove — an impact on First Amendment rights. They argue

that the Pennsylvania Act "deliberately restricts the right to distribute feature films" but nowhere mention that the Third Circuit Court of Appeals held that the Pennsylvania Act did not on its face violate any First Amendment rights and that the District Court found there was no credible evidence of any such impact. As the District Court found:

> "In fact, the Pennsylvania Act had had little or no impact on First Amendment values. There was no credible evidence that the Act has had or will have any effect on the quality or number of films being produced or being exhibited in the Commonwealth of Pennsylvania. There was also not evidence that the Act has caused a material delay in the exhibition of films in the Commonwealth. No evidence was offered which suggested that more films miss their release dates now than before the Act. The trade screening requirement, when combined with production delays, creates a minimal risk of delayed release. Distributors, however, accelerate post-production and have missed release dates in only a handful of cases. Even in these instances, it is not proven that the Act caused the delay. Plaintiffs claim that some distributors have chosen not to release certain films at an early date in Pennsylvania because of the 42-day clause. Although it may marginally influence a distributor's marketing decision, the clause does not compel the distributor to make such a decision."

In fact, contrary to finding any restriction on First Amendment rights caused by the Pennsylvania Act, the District Court concluded that the Act furthered the rights protected by the First Amendment by promoting wider and more rapid distribution of motion pictures. 614 F.Supp. at 1118 (A 125).

The entire premise of this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), was that the taxing

statute in question imposed a burden on the press and rights protected by the First Amendment. As stated by this Court, "Any tax that the press must pay, of course, imposes some burden". 460 U.S. at 583. Unlike the statute at issue in *Minneapolis Star*, the Pennsylvania Act, after a detailed inquiry into its operation, has not been shown to delay the release or inhibit production or distribution of motion pictures in Pennsylvania.

This Court indicated that singling out a First Amendment industry for differential taxation was particularly invidious because of the concern that acceptance of a lower tax rate imposed through a different method of taxation might lead in the future to the imposition of a greater burden without the courts being able to detect it due to the difficulty of evaluating relative burdens of various methods of taxation. It was not simply the differential treatment that bothered this Court in *Minneapolis Star*, it was the threat that extra burdens might later be imposed that would escape detection. 460 U.S. at 590 n. 13. The Pennsylvania Act poses no such threat.

As recognized by the Court of Appeals for the Third Circuit, the Pennsylvania Act is content neutral, trade practice regulation that is directed at the motion picture industry because of its unique market structure and not to the inhibition of the expression of ideas. 800 F.2d at 374 (A 10). In *Minneapolis Star*, this Court was concerned because the differential treatment could not be explained by some special characteristic of the press, and that fact "suggested" that "the goal of regulation is not unrelated to suppression of expression". The facts leading to the enactment of the Pennsylvania Act place it in an entirely different context than the tax statute at issue in *Minneapolis Star*. The Third Circuit noted that the motion picture industry has special characteristics which prompted a special need for trade practice legislation like the Pennsylvania Act. The motion picture industry was not singled out to suppress speech; it was

selected to eliminate certain reprehensible trade practices including those leading to the Paramount decree, that existed only in the market structure of that industry.

As stated by the District Court, "The Act takes a small step against dishonest and unfair practices in the motion picture industry." The District Court specifically found that those widespread unfair practices in Pennsylvania consisted of, *inter alia*, misrepresentations by distributors, oppression of small exhibitors by larger exhibitors, collusion between distributors and large exhibitors to sneak looks at competitor's bids, sham bidding and unreasonably broad clearances. 614 F.Supp. at 1106 (A 98-99). Most, if not all of these unfair practices impacted on the public by limiting the dissemination of motion pictures either directly or indirectly by the elimination of small theatre owners. The Pennsylvania Act's focus on the motion picture industry was explicitly designed to further First Amendment objectives of promoting communication. *See* 73 P.S. 203-2 ("Legislative findings and purposes").

This Court's decision in *Minneapolis Star* carefully preserved the method of analysis set forth in a "long line of precedent" including, specifically, *United States v. O'Brien*, 391 U.S. 367 (1968). 460 U.S. 585 n. 7. The District Court and Court of Appeals for the Third Circuit correctly analyzed the constitutionality of the Pennsylvania Act using the methods prescribed by this Court in *Minneapolis Star* and *O'Brien*. Balancing the burdens on First Amendment rights imposed by the legislation against the interests asserted by the State could only lead to upholding the Act because the State goals were accomplished at *no* cost to First Amendment rights. The result reached in this case and the method of analysis does not conflict with any other court. The First Amendment principles set down by this Court are being consistently applied with regard to statutes like the Pennsyl-

vania Act. *Allied Artists Picture Corp. v. Rhodes*, *supra* (holding that Ohio anti-blind bidding law does not violate the First Amendment).

The Court of Appeals did not emasculate *Minneapolis Star* and the principles set forth there. It carefully applied the lessons taught by this Court and utilized the methods of analysis this Court delineated. The distributors seek to throw away the prior law developed by this Court and to propound sweeping declarations that regulation touching on First Amendment activity is "inherently invidious" (Petition at 15), a course that is directly contrary to the circumspect ruling made in *Minneapolis Star* in the face of a statute fraught with the potential for abuse and for which the State offered no satisfactory justification. The decision rendered by the Court of Appeals herein fully complies with the precedents set by this Court and presents no necessity for review.[3]

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3. At trial the bulk of the evidence presented by the distributors dealt with purported burdens which the Pennsylvania Act placed upon interstate commerce. Despite the Commerce Clause focus at trial, the distributors have not raised any violation of the Commerce Clause as a ground for granting their petition.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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